Supreme Court, U.S.
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No. 97-461

In The

Supreme Court of the United States

October Term, 1997

WISCONSIN DEPARTMENT OF CORRECTIONS, *et al.*,

Petitioners,

v.

KEITH D. SCHACHT,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF ON THE MERITS FOR RESPONDENT

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QUESTION PRESENTED

Is there a "futility exception" to the mandate of 28 U.S.C. § 1447(c) such that an action should not be remanded to state court, when the action was brought under 42 U.S.C. § 1983 containing claims against a state agency and state officials in their official capacities and was removed to federal court by those defendants without waiving their Eleventh Amendment immunity?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

JURISDICTION 1

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 5

ARGUMENT 7

I. THE ACTION WAS NOT PROPERLY REMOVED TO FEDERAL COURT BY THE PETITIONERS 7

A. Unless The State's Eleventh Amendment Immunity Was Waivable And Waived By Petitioners, The Removal Of The Action To Federal Court Was In Violation Of The Removal Statutes 8

B. There Was No Need For The State To Remove The Action From State Court 26

II. THERE IS NO FUTILITY EXCEPTION TO THE REMAND MANDATE OF 28 U.S.C. § 1447(c) ... 29

A. The Rule Of *International Primate Protection League*, That Remand Is Required When It Appears The Federal Court Lacks Subject Matter Jurisdiction, Should Be Dispositive In This Case 30

B. It Would Be Both Improper And Unwise For Federal Courts To Speculate About The Alleged Futility Of A Remand As Petitioners Suggest In This Case 38

TABLE OF CONTENTS – Continued

Page

III. PETITIONERS' INTERPRETATION OF THE REMAND STATUTES IS CONTRARY TO FUNDAMENTALS OF STATUTORY CONSTRUCTION, THE INTENT OF CONGRESS, AND SOUND PUBLIC POLICY 41

CONCLUSION 45

TABLE OF AUTHORITIES

Page

CASES

Alabama v. Pugh, 438 U.S. 781 (1978) 9

American Fire & Casualty Co. v. Finn, 341 U.S. 6 (1951) 33

Ames v. Kansas, 111 U.S. 449 (1884) 22

Arizonans for Official English v. Arizona, 117 S.Ct. 1055 (1997) 12, 13, 15, 16, 34, 35

Barbara v. New York Stock Exchange, 99 F.3d 49 (2nd Cir. 1996) 36

Bender v. Williamsport Area School Dist., 475 U.S. 534 (1986) 34

Bromwell v. Michigan Mutual Insurance Company, 115 F.3d 208 (3rd Cir. 1997) 31, 35

Budinich v. Becton Dickinson & Co., 486 U.S. 196 (1988) 38

Claflin v. Houseman, 93 U.S. 130 (1876) 44

Chicago, R.I.&P. Ry. Co. v. Martin, 178 U.S. 245 (1900) 21

City of Chicago v. International College of Surgeons, 118 S.Ct. 534 (1997) 21, 22

Connecticut National Bank v. Germain, 503 U.S. 249 (1992) 42, 43

Delmuth v. Muth, 491 U.S. 223 (1989) 22

Edelman v. Jordan, 415 U.S. 651 (1974) 10, 14, 21, 25, 28

Employees v. Missouri Department of Public Health and Welfare, 411 U.S. 279 (1973) 22

TABLE OF AUTHORITIES – Continued

Page

Ex parte Collett, 337 U.S. 55 (1949) 42

Ex parte McCardle, 7 Wall. 506, 19 L.Ed. 264 (1868) 13

Ex parte Young, 209 U.S. 123 (1908) 28

Ex parte State of New York, 256 U.S. 490 (1921) 10

Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368 (1981) 38

Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) 10

Ford Motor Co. v. Department of Treasury of State of Indiana, 323 U.S. 459 (1945) 10

Frances J. v. Wright, 19 F.3d 337 (7th Cir. 1994), *cert. denied*, 513 U.S. 876 (1994) ..... *passim*

Freeman v. Lane, 962 F.2d 1252 (7th Cir. 1992) 40

Gibson v. City of Glendale Police Department, 786 F.Supp. 1452 (E.D. Wis. 1992) 20

Gorka By Gorka v. Sullivan, 82 F.3d 772 (7th Cir. 1996) 35

Grubbs v. General Electric Credit Corp., 405 U.S. 699 (1971) 18, 19

Hafer v. Melo, 502 U.S. 21 (1991) 14, 15, 41

Hans v. Louisiana, 134 U.S. 1 (1890) 8, 10, 19

Henry v. Metropolitan Sewer District, 922 F.2d 332 (6th Cir. 1990) 37

Hutto v. Finney, 437 U.S. 678 (1978) 10

TABLE OF AUTHORITIES – Continued

Page

Idaho v. Coeur d'Alene Tribe of Idaho, 117 S.Ct. 2028 (1997) 22

Illinois v. City of Milwaukee, 406 U.S. 91 (1972) 22

In re Carter, 618 F.2d 1093 (5th Cir. 1980), *cert. denied*, 450 U.S. 949 (1981) 33

International College of Surgeons v. City of Chicago, Illinois, 91 F.3d 981 (7th Cir. 1996), *rev'd*, 118 S.Ct. 523 (1997) 36

International Primate Protection League v. Administrators of Tulane Educational Fund, 500 U.S. 72 (1991) ..... *passim*

Kruse v. State of Hawai'i, 68 F.3d 331 (9th Cir. 1995) 37, 38, 39

Lindas v. Cady, 150 Wis.2d 421, 441 N.W.2d 705 (1989) 34

Maine Association of Interdependent Neighborhoods v. Commissioner, Maine Department of Human Services, 876 F.2d 1051 (1st Cir. 1989) 32, 37

Mansfield, C. & L.M.R. Co. v. Swan, 111 U.S. 379 (1884) 13

McKay v. Boyd Construction Co., Inc., 769 F.2d 1084 (5th Cir. 1985) 36

Mt. Healthy City Bd. of Ed. v. Doyle, 429 U.S. 274 (1977) 18, 24, 25

Oneale v. Thornton, 6 Cranch 53, 3 L.Ed. 150 (1810) 42

Patsy v. Board of Regents, 457 U.S. 496 (1982) 17, 18

TABLE OF AUTHORITIES – Continued

Page

Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984) 9, 32

Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299 (1990) 26

Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993) 14

Quern v. Jordan, 440 U.S. 332 (1979) 9, 28

Richardson v. McKnight, 117 S.Ct. 2100 (1997) 28

Roach v. West Virginia Regional Jail and Correctional Facility Authority, 74 F.3d 46 (4th Cir. 1996) 35

Robinson v. Shell Oil Company, 117 S.Ct. 843 (1997) 41, 43

Romero v. International Terminal Operating Co., 358 U.S. 354 (1959) 22

Rubin v. United States, 449 U.S. 424 (1981) 42

Schacht v. Wisconsin Department of Corrections, 116 F.3d 1151 (7th Cir. 1997) 34, 35

Smith v. Wisconsin Department of Agriculture, Trade and Consumer Protection, 23 F.3d 1134 (7th Cir. 1994) 36, 38

State of Missouri v. Fiske, 290 U.S. 18 (1933) 10

Steel Company v. Citizens for a Better Environment, 118 S.Ct. 1003 (1998) 13, 33, 38

Tafflin v. Levitt, 493 U.S. 455 (1990) 44

TABLE OF AUTHORITIES – Continued

Page

United States ex rel. Lawrence v. Woods, 432 F.2d 1072 (7th Cir. 1970) 40

United States v. Corrick, 298 U.S. 435 (1936) 34

United States v. Goldenberg, 168 U.S. 95 (1897) 42

United States v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989) 41, 42

Vogt v. Nelson, 69 Wis. 2d 125, 230 N.W.2d 123 (1975) 44

Welch v. Texas Department of Highways and Public Transportation, 483 U.S. 468 (1987) 14

Will v. Michigan Department of State Police, 491 U.S. 58 (1989) 12, 14, 15, 16, 41

Zinn v. State, 112 Wis. 2d 417, 334 N.W.2d 67 (1983) 40

STATUTES AND RULES

28 U.S.C. § 1441 ..... 1, 11

28 U.S.C. § 1441(a) ..... *passim*

28 U.S.C. § 1441(b) 7, 8, 11, 20, 23

28 U.S.C. § 1441(c) 43

28 U.S.C. § 1446(b) 24

28 U.S.C. § 1447(c) ..... *passim*

42 U.S.C. § 1983 ..... *passim*

Civil Rights Act of 1871 ..... 9, 18, 20

Fed. R. Civ. P. 11 24

TABLE OF AUTHORITIES – Continued

Page

Fed. R. Civ. P. 12(b)(6) 25

Judiciary Act of 1789 42

Revised Judicial Code of 1948 43

Title VII of the Civil Rights Act of 1964 10

§ 802.09, Wis. Stats. 40

§ 814.025, Wis. Stats. 24

§ 893.82, Wis. Stats. 40

§ 895.46(1)(a), Wis. Stats. 29

CONSTITUTIONAL PROVISIONS

Eleventh Amendment ..... *passim*

Due Process Clause of the Fourteenth Amendment 4

Wis. Const. Art. I, § 1 40

OTHER AUTHORITY

Edward Hartnett, *A New Trick from an Old and Abused Dog: Section 1441(c) Lives and Now Permits the Remand of Federal Question Cases*, 63 Fordham L. Rev. 1099 (1995) 7, 21, 42

JURISDICTION

Respondent is satisfied with the statement on jurisdiction in the Brief for Petitioners on the Merits at 3, except for the assertion therein that the district court had jurisdiction under 28 U.S.C. § 1441. Respectfully, that presupposes the outcome regarding the issue presented in this case, and as explained in detail below, the district court did not have original jurisdiction under 28 U.S.C. § 1441(a).

STATEMENT OF THE CASE

The following supplements the Statement of the Case in the Brief for Petitioners on the Merits at 7-8.

This action was commenced by respondent Keith D. Schacht by the filing of the Complaint in Dane County Circuit Court in the State of Wisconsin on December 13, 1995. Record 2 and 6. In the Complaint respondent named as defendants the agency that had terminated his employment, the Wisconsin Department of Corrections, and the state officials who had participated in the alleged wrongful termination, including the warden of Oakhill Correctional Institution, the associate warden, the personnel manager, and a captain and a lieutenant at the institution where the respondent had served as a correctional officer. Joint Appendix (hereinafter referred to as "App.") 1-2. The individual defendants were sued personally and in their official capacities. *Id.*

The Complaint alleges that the plaintiff began his employment with the Wisconsin Department of Corrections on October 25, 1982 and worked as a correctional officer receiving only favorable performance reviews until his termination on February 18, 1993. App. 3-5. The Complaint further alleges these facts: on January 20, 1993 Schacht had brought some butter into the institution intending to give it to a fellow officer who had earlier purchased seafood from Schacht in a sideline business he maintained; at the end of the shift on the morning of January 21, 1993 defendant Captain Laliberte detained Schacht and conducted an unwarranted search of his backpack, producing the butter and miscellaneous personal items including a three-ounce tube of Colgate toothpaste, two black pens, and three red pens; Laliberte wrongfully determined that those items were the property of the institution when in fact they belonged to Schacht; without making an adequate or reasonable investigation Laliberte immediately suspended Schacht without pay; the defendants disseminated the wrongful accusations of theft throughout the institution, thereby damaging Schacht's good name and reputation; on January 23, 1993 and February 4, 1993 Laliberte interviewed a fellow corrections officer of Schacht, who was his housemate, and who confirmed that Schacht had brought the butter from his home to give it to a fellow employee and confirmed that the pens and toothpaste were also Schacht's personal property; Laliberte and defendant Lieutenant Hepp then conducted sham interrogations of the defendant and a so-called "investigation" in which they maliciously and recklessly disregarded the truth and repeatedly subjected Schacht to harassment in the form of

harangues and false allegations; the interrogations and "investigation" were not for the purpose of discerning the truth and were instead part of a malicious attempt to wrongfully terminate Schacht's employment; ultimately all of the defendants acting in concert with each other, and knowing that there was no reasonable basis for doing so, wrongfully terminated Schacht's employment; and after his termination they disseminated erroneous and defamatory information to third parties which damaged Schacht's reputation and severely impaired his ability to secure subsequent employment. App. 3-6.

The Complaint alleges that the defendants deprived Schacht of his constitutionally protected property interest in continued public employment and his constitutionally protected liberty interest in his good name and reputation and that they caused him to suffer mental anguish and despair, humiliation, ridicule, stigmatization, and embarrassment, and loss of reputation, earnings, and earning capacity. App. 6. Schacht asked for compensatory and punitive damages, attorneys' fees and litigation costs, and "[s]uch other and further relief as the court deems just." App. 7.

On February 2, 1996 the defendants (petitioners in this Court) filed a timely notice of removal of the action in the United States District Court for the Western District of Wisconsin. Record 2. After conducting some discovery, on July 15, 1996 petitioners filed their first substantive motion in the district court, which was a motion for summary judgment requesting dismissal of the Complaint on the grounds, *inter alia*, that Schacht's claims against the State and state officials in their official

capacities were barred under the Eleventh Amendment. Record 18; Record 19 at 3-4; Record 20 at 32.

In his brief in opposition to petitioners' motion for summary judgment in the district court, the respondent stressed that the equitable relief he was seeking included reinstatement and back pay and whatever other injunctive relief would be appropriate and consistent with that result. Record 25 at 2; Record 26 at 12. He emphasized that his legal claims for violations of the Due Process Clause of the Fourteenth Amendment consisted of (1) denial of procedural due process because there was no adequate or fair inquiry in which he could have had a reasonable opportunity to be heard prior to his suspension and termination and (2) denial of substantive due process because he was arbitrarily and capriciously suspended and terminated for no just cause and for what was in fact a malicious and improper purpose. Record 25 at 8-13. Schacht detailed the facts of his case in a sworn affidavit consisting of twenty-two typewritten pages. Record 27. He testified that the true purpose for his termination was to stop him from becoming by seniority first shift officer, because he was not willing to cover up or to allow a "snitch system" in the institution, he disapproved of certain of the staff allowing inmates to break the rules, he would have stopped pilfering from the institution by certain members of the staff, he was uniformly fair and honest with the inmates, and he therefore irritated some of the managerial officers and staff of the prison. *Id.* at 8-10; Record 16. Schacht also submitted a detailed affidavit from a former sergeant at the institution personally acquainted with the facts of his case. Record 28.

The district court granted the motion for summary judgment in its entirety. App. 27-34. Thereby, it dismissed the Complaint and all claims contained therein with prejudice – both the claims against the State agency and its officials sued in their official capacities and the claims against the individual defendants personally. *Id.*

Immediately prior to the final pretrial conference scheduled for September 4, 1996 and the district court's subsequent granting of summary judgment dismissing the Complaint on September 13, 1996, the parties agreed that the major factual issues for trial were whether Schacht was treated fairly and impartially regarding the decision to suspend him and the decision to discharge him from employment and whether he received the process to which he was due regarding the decision to suspend him and the decision to terminate his employment. App. 26.

SUMMARY OF THE ARGUMENT

The Seventh Circuit correctly determined that petitioners had not properly removed this case to federal court. Eleventh Amendment immunity, unless waived by the State, serves to bar federal subject matter jurisdiction over 42 U.S.C. § 1983 claims against the State. Because petitioners had not waived their Eleventh Amendment immunity the district court lacked original jurisdiction under 28 U.S.C. § 1441(a), and the court below properly remanded the action to state court pursuant to 28 U.S.C. § 1447(c).

Petitioners had no need to remove the case from state court. State courts are competent courts of original jurisdiction for the purpose of hearing § 1983 claims. There is no reason that the State would have been harmed had the case remained in state court. The fact that the Eleventh Amendment bars removal by a state does not relegate states to second class citizen status, for states may remove if they waive the Eleventh Amendment immunity.

There is no futility exception to the remand mandate of 28 U.S.C. § 1447(c). This Court's ruling in *International Primate Protection League v. Administrators of Tulane Educational Fund*, 500 U.S. 72 (1991), requires that a federal court remand the entire case when it appears that it lacks subject matter jurisdiction. That jurisdictional bar prevents the federal court from considering whether the case is futile on the merits and subject to dismissal.

It would be unwise for a federal court to speculate about the alleged futility of a remand to state court. Respondent could file amended or supplemental pleadings stating claims under Wisconsin law. Certainly, respondent could proceed in state court on his § 1983 claims against the defendants in their individual capacities whereupon any judgment obtained would be paid by the State under Wisconsin's indemnification statute. A federal court is not the proper forum for the interpretation of state law.

Fundamentals of statutory construction, the intent of Congress, and sound public policy belie petitioners' interpretation of the remand statutes. The language of § 1447(c) is unambiguous and mandates that the action

shall be remanded. Congress has repudiated piecemeal removal and has left no doubt that it intended that there shall be a remand of the entire action under § 1447(c).

ARGUMENT

I. THE ACTION WAS NOT PROPERLY REMOVED TO FEDERAL COURT BY THE PETITIONERS.

In the Brief for Petitioners on the Merits (hereinafter referred to as "petitioners' brief") petitioners attempt to rationalize their removal of the action from state court to federal court without waiving the immunity otherwise guaranteed to them under the Eleventh Amendment. They obscure the fact that the removal was for the purpose of converting the shield of the Eleventh Amendment into a sword designed to eviscerate respondent's requested relief. In removing the action to federal court without intending to waive their Eleventh Amendment immunity, petitioners did not exercise the federal court's removal jurisdiction for reasons traditionally held to underlie the removal statutes enacted by Congress.[1] To

[1] The removal statutes utilized by petitioners in this case, 28 U.S.C. §§ 1441(a) and 1441(b), were originally enacted by Congress for the purpose of insulating litigants against the provincialism that could exist when parties are sued in state court. *See, e.g.*, Edward Hartnett, *A New Trick from an Old and Abused Dog: Section 1441(c) Lives and Now Permits the Remand of Federal Question Cases*, 63 Fordham L. Rev. 1099, 1108-09 text and nn.42-45 (1995). That consideration evaporates when a state agency or state employees sued in their official capacities are sued in the courts of their own state. In any event, suits in federal court against those defendants are barred under the

the contrary, petitioners' removal was an abuse of the removal statutes.

Nowhere in their brief do petitioners even attempt to state why they would have been harmed by defending the litigation in state court, and indeed no harm conceivably could have fallen upon them by allowing the action to remain in state court. Moreover, the privilege of removal to federal court – if it is indeed the privilege or "right" petitioners assert – was readily available to them merely by waiving Eleventh Amendment immunity. Their failure to do so belies the hollowness of their arguments in this case and the fact that petitioners merely have been playing games with the federal rules to their own strategic advantage. They seek to use the Eleventh Amendment as a "Get-Out-Of-Litigation-Free" card, rather than the "Get-Out-Of-Litigation-In-Federal-Court" card that the Eleventh Amendment was intended to be.

A. Unless The State's Eleventh Amendment Immunity Was Waivable And Waived By Petitioners, The Removal Of The Action To Federal Court Was In Violation Of The Removal Statutes.

As is discussed in detail below, this case presents a straight-forward question of statutory construction. The issue is whether the district court had "original jurisdiction" within the meaning of 28 U.S.C. §§ 1441(a) and 1441(b) and, if not, whether the action should be remanded to state court under the mandate of 28 U.S.C. § 1447(c). In this case, as the Seventh Circuit held, the

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Eleventh Amendment and this Court's holding in *Hans v. Louisiana*, 134 U.S. 1 (1890).

district court lacked original jurisdiction because petitioners were immune from suit in the federal court although they were not immune from suit in state court. Because of the shield of the Eleventh Amendment, the only way petitioners could have properly removed the action to federal court was if they expressly and unconditionally renounced their Eleventh Amendment immunity, which they have refused to do. Instead, petitioners removed the action and urged dismissal of most of respondent's claims on Eleventh Amendment grounds. Indeed, by arguing that the district court lacked jurisdiction over the institutional and individual defendants sued in their official capacities, petitioners effectively were conceding that removal was inappropriate under § 1441(a). Eleventh Amendment immunity is not an affirmative defense, which must be asserted or it is waived. To the contrary, Eleventh Amendment immunity is there until and unless it is waived.

When petitioners removed the action on February 12, 1996, it was well-settled that the Eleventh Amendment applies to actions arising under 42 U.S.C. § 1983. *See, Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 100 (1984) ("It is clear, of course, that in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment. . . . This jurisdictional bar applies regardless of the nature of the relief sought."); *Quern v. Jordan*, 440 U.S. 332, 338-341 (1979) (The section of the Civil Rights Act of 1871 which creates a cause of action under 42 U.S.C. § 1983 for deprivation of civil rights under color of law did not abrogate the Eleventh Amendment immunity of the states.); *Alabama v. Pugh*,

438 U.S. 781, 782 (1978) ("There can be no doubt . . . that suit against the State and its Board of Corrections is barred by the Eleventh Amendment, unless Alabama has consented to the filing of such a suit."); *Hutto v. Finney*, 437 U.S. 678, 699 (1978) (Although the suit against prison officials was, for all practical purposes, brought against the State, plaintiffs were prevented by the Eleventh Amendment from suing the State by name.); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 447-448 (1976) (Only language as specific as that in the 1972 Amendments to Title VII of the Civil Rights Act of 1964 regarding employment discrimination on the basis of race, color, religion, sex or national origin is adequate to abrogate "the shield of sovereign immunity afforded the State by the Eleventh Amendment."); *Edelman v. Jordan*, 415 U.S. 651, 663, 678 (1974) (A suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment.); *Ford Motor Co. v. Department of Treasury of State of Indiana*, 323 U.S. 459, 464 (1945) ("[W]hen the action is in essence one for the recovery from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants."); *State of Missouri v. Fiske*, 290 U.S. 18, 26 (1933) (Suit by an individual against a state cannot be entertained on the ground that the controversy arises under the Constitution or laws of the United States.); *Ex parte State of New York*, 256 U.S. 490, 497 (1921) ("[T]he entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a state without consent given."); *Hans v. Louisiana*, 134 U.S. 1, 10 (1890) (A suit cannot be

entertained by a citizen against his own state on the ground that the controversy arises under the Constitution or laws of the United States.).

Since the Complaint that was filed in state court named the Wisconsin Department of Corrections and certain of its officers in their official capacities as defendants, the action should not have been removed by petitioners. The claims against those defendants were barred from suit in federal court by the Eleventh Amendment. *Id. See also, Frances J. v. Wright*, 19 F.3d 337 (7th Cir. 1994), *cert. denied*, 513 U.S. 876 (1994). That petitioners knew the action as removed contained claims barred under the Eleventh Amendment is patent from the fact that they promptly moved the district court for summary judgment dismissing those claims on Eleventh Amendment immunity grounds and received the requested relief. App. 30.

Under the circumstances, the action should not have been removed under 28 U.S.C. § 1441. The district court lacked subject matter jurisdiction under § 1441, because respondent's claims against the department and the defendants sued in their official capacities were barred from suit in federal court. *See, supra* at 9-11. Thus, the action as pled by respondent and filed in the forum of choice by respondent was not one over which the district court would have had original jurisdiction. *See, infra* at 18-19. Therefore, the action did not qualify as one susceptible to removal under 28 U.S.C. § 1441(b).

The jurisdictional bar to removal easily could have been lifted by petitioners themselves. All they had to do was waive – that is, file an explicit written waiver of

Eleventh Amendment immunity which has the effect of curing the jurisdictional problem. *Cf., e.g., Arizonans for Official English v. Arizona*, 117 S.Ct. 1055, 1069 (1997) (The State of Arizona expressly waived its right to assert the Eleventh Amendment as a defense to the award of damages.).

Petitioners argue that there is no jurisdictional problem because the Department of Corrections and the defendants sued in their official capacities are not "persons" under § 1983 and therefore are not suable entities. Petitioners' brief at 15-19. However, because they are not suable in their official capacities does not mean that they are not suable under some other state law theory or in their individual capacities. *See, infra* at 39-40. Petitioners build their argument upon *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989) and *Arizonans. Id.* They mistakenly construe both cases to apply to the case at bar and conclude that because some of the petitioners are not "persons" under § 1983 there was not an Eleventh Amendment problem with their removal of the action from state court. Their argument therefore presents a conundrum: if they are correct that they are not "persons" for the purposes of the Eleventh Amendment, then they are not state actors. For numerous reasons their argument is misplaced.

First, it presupposes, erroneously, that the question of whether respondent stated a claim upon which relief can be granted should be determined before the question of whether the district court had proper subject matter

jurisdiction. *See id.*[2] The true question raised by petitioner's argument about a state not being a "person" under § 1983 is the question of whether a claim exists against the State and state officials upon which relief can be granted. The flaw in the argument is in the answer to this question: which comes first, the jurisdictional analysis or the "definitional analysis?"

The answer to that question has been clear for well over a century. As the Court said just recently, "[T]he first and fundamental question is that of jurisdiction. . . . " *Steel Company v. Citizens for a Better Environment*, 118 S.Ct. 1003, 1012 (1998). Only if the parties have properly invoked the limited subject matter jurisdiction of the federal courts is it appropriate to assess whether the Complaint states a valid claim. The determination of whether a claim has been stated upon which relief can be granted must come second, because " 'without jurisdiction the court cannot proceed at all in any cause.' " *Id., quoting Ex parte McCardle*, 7 Wall. 506, 514, 19 L.Ed. 264 (1868). "The requirement that jurisdiction be established as a threshold matter 'spring[s] from the nature and limits of the judicial power of the United States' and is 'inflexible and without exception.' " *Id., quoting Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884).

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[2] Petitioners refer, at 16, to their suggested procedural device as "definitional" or "the definitional analysis." This phrase, which petitioners invent, appears to be a shorthand reference to the inquiry as to whether a complaint states a claim upon which relief can be granted.

It is axiomatic that, when one makes a motion to dismiss raising both issues of jurisdiction and sufficiency of the pleadings, the court looks first to the issue of jurisdiction. Only if the court has jurisdiction does it go on to reach the question of whether the plaintiff has stated a claim for relief. The propriety of this approach in the domain of Eleventh Amendment jurisprudence is clear. *See, e.g., Edelman*, 415 U.S. at 678 (the Eleventh Amendment is in the nature of a jurisdictional bar); *Welch v. Texas Department of Highways and Public Transportation*, 483 U.S. 468, 480-82 text and n.10 (1987). *See also, Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 150 (1993) (Stevens, J., dissenting) ("[A] defense based on the Eleventh Amendment, even when the Amendment is read at its broadest, does not contend that the State or state entity is shielded from liability for its conduct, but only that the federal courts are without jurisdiction over claims against the State or state entity. . . . [T]he Eleventh Amendment only determines where, or more precisely, where not, that suit may be brought.").

Will and *Arizonans* are not dispositive in this case for various reasons. First, as Justice O'Connor wrote for an undivided Court in *Hafer v. Melo*:

> Most certainly, *Will*'s holding does not rest directly on the Eleventh Amendment. Whereas the Eleventh Amendment bars suits in federal court "by private parties seeking to impose a liability which must be paid from public funds in the state treasury," *Edelman v. Jordan*, 415 U.S. 651, 663, 94 S.Ct. 1347, 1355, 39 L.Ed. 2d 662 (1974), *Will* arose from a suit in *state* court. We considered the Eleventh Amendment in *Will* only because the fact that Congress did not intend to override state immunity when it enacted § 1983 was relevant to statutory construction. . . .

Hafer v. Melo, 502 U.S. 21, 30 (1991) (emphasis in the original). *See also, Will*, 491 U.S. at 66 ("This does not mean . . . the scope of the Eleventh Amendment and the scope of § 1983 are not separate issues. Certainly they are."). While *Will* held that a state is not a "person" under § 1983, it did so in the context of a case filed in state court and coming to this Court from the Supreme Court of Michigan, and it did not involve the issue of removal that is extant in the case at bar. *Id.*

Petitioners argue, as if it is the *coup de grâce*, that the fact that a state is not a "person" under § 1983 is "The stopper" or "The critical stopper." Petitioners' brief at 15, 16. For that proposition they rely upon *Arizonans*, which said in the context of that case, "The stopper was that § 1983 creates no remedy against a State." 117 S.Ct. at 1070.

However, petitioners misconstrue why the Court said it was "The stopper" in *Arizonans*. In that case, the State of Arizona expressly waived its right to assert the Eleventh Amendment as a defense to the award of nominal damages. *Id.* at 1069. The action had been commenced in federal court, and removal was not an issue. *Id.* at 1060. The issue before the Court was mootness. *Id.* at 1069. It was in that context that the Court held that, "the claim for relief the Ninth Circuit found sufficient to overcome mootness was nonexistent." The "stopper" in *Arizonans* regarded the question of whether the plaintiff had stated a claim for relief that was not moot and had nothing to do

with the Eleventh Amendment or subject matter jurisdiction. Thus, what was the stopper in *Arizonans* is not at issue in this case.

While petitioners pursue the red herring of the possible application of *Will* and *Arizonans*, the fact remains that the limited scope of § 1983 and mootness have nothing to do with the Eleventh Amendment and subject matter jurisdiction. Petitioners confidently predict that a judge of any court – state or federal – would conclude as the district judge did in this case that respondent has failed to state a claim against the State and the state officials. Petitioners' brief at 27-28. But that prediction is off target.[3] *See* Section II.B., *infra* at 39-41. Because the federal courts lack subject matter jurisdiction in this case, it is inappropriate to speculate. *Id.* at 38-39. However, even if such speculation were warranted, the outcome of this litigation upon remand to state court is anything but certain. At an absolute minimum, the state court would allow respondent to pursue his claims against the defendants sued in their individual capacities. Damages and retroactive injunctive relief still will cost the State treasury, because a judgment against those defendants as individuals nonetheless will be paid by the State under its indemnification statute. *See, infra* at 29 n.14. Further, the possibility exists that respondent may be able to proceed against the State and state officials for damages resulting

[3] Of course, if petitioners were so confident, why did they go through the time and expense of removing the action to federal court rather than asking the state court to dismiss? In any event, as explained in detail below, because the federal court lacked subject matter jurisdiction any decision on the merits should be made by the state court.

from their breach of respondent's rights under the Wisconsin Constitution. *See, infra* at 40.

All respondent must show in this case is that there is a legitimate concern about the applicability of the Eleventh Amendment as a bar to claims in this case, because 28 U.S.C. § 1447(c) provides that remand of the entire action is required "when it appears that the district court lacks subject matter jurisdiction." *See* Section II.A., *infra* at 29-38. In this case there is more than ample reason to hold that respondent's claims for relief implicate the Eleventh Amendment.

Petitioners fault the Seventh Circuit for raising the issue of subject matter jurisdiction under the Eleventh Amendment on its own initiative, and they cite the oft-quoted passage from *Patsy v. Board of Regents*, 457 U.S. 496, 515 n.19 (1982), that "we have never held that it is jurisdictional in the sense that it must be raised and decided by this Court on its own motion." Petitioners' brief at 21. Petitioners misconstrue the footnote from *Patsy*, which they refer to repeatedly and ultimately mislabel as "the clear holdings of *Patsy*." *Id.* at 22.[4]

First, the defendant Board of Regents in *Patsy* had requested that the Supreme Court not address the Eleventh Amendment question so that the Court would rule solely on the question of whether exhaustion of state

[4] *Patsy*, of course, dealt exclusively with the issue of whether exhaustion of state administrative remedies was a prerequisite under § 1983, and the Court explicitly chose not to address Eleventh Amendment issues. 457 U.S. at 515 n.19. To attempt to shoe-horn *Patsy* into this case necessarily misconstrues the footnote.

administrative remedies was a prerequisite to an action under the Civil Rights Act of 1871. 457 U.S. at 515 n.19. The full quotation that is relevant from *Patsy* explains that the reason the Court has never held that Eleventh Amendment immunity is jurisdictional in the sense that it must be raised and decided by this Court on its own motion was "because of the importance of state law in analyzing Eleventh Amendment questions and *because the State may, under certain circumstances, waive this defense. . . .* " *Id.* (emphasis added). Following the complete quotation is a citation inviting comparison to *Mt. Healthy City Bd. of Ed. v. Doyle*, 429 U.S. 274, 279 (1977). *Id.* In *Mt. Healthy*, the Court actually did take up the issue of Eleventh Amendment immunity, saying:

> The District Court found it unnecessary to decide whether the Board was entitled to immunity from suit in the federal courts under the Eleventh Amendment, because it decided that any such immunity had been waived by Ohio Statute and decisional law. . . . We prefer to address instead the question of whether such an entity had any Eleventh Amendment immunity in the first place, since if we conclude that it had none it will be unnecessary to reach the question of waiver.

429 U.S. 274 at 279. Thus, *Patsy* hardly stands for the proposition that it was improper for the Seventh Circuit to address the issue in this case – a case in which the district court ruled against respondent on Eleventh Amendment grounds dismissing substantial claims.

The central question in a case such as the case at bar was identified in *Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 702 (1971), in which the Court said:

> Longstanding decisions of this Court make clear . . . that where after removal a case is tried on the merits without objection and the federal court enters judgment, the issue in subsequent proceedings on appeal is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court.[5]

In order to determine whether the remand mandate of 28 U.S.C. § 1447(c) should be invoked in this case, the focus should be upon the question of whether the federal district court would have had original jurisdiction of the case had it been filed in that court. *Id.* For the reasons stated above, it clearly lacked subject matter jurisdiction over all claims made in the Complaint because of the Eleventh Amendment and the *Hans*[6] doctrine.

Petitioners argue that, "Had Schacht filed this action in federal district court, it would have had jurisdiction over the individual capacity claims on which the appeal focused." Petitioners' brief at 10. For two reasons, however, that statement only begs the question. First, because

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[5] In the instant action, of course, the case has not been tried on the merits without objection, and the federal court has granted summary judgment. Presumably, had the Seventh Circuit heard the appeal on its merits and reversed the granting of summary judgment, on remand Schacht prior to trial could have objected to the defects in the removal procedure to which he had not objected prior to the granting of summary judgment. Thus, it was even more appropriate for the Seventh Circuit to raise the issue at the time that it did. That actually served the purpose of judicial economy.

[6] *Hans v. Louisiana*, 134 U.S. 1 (1890).

the case was removed by petitioners, respondent necessarily focused upon those claims that remained viable in federal court and not on the other claims raised by the Complaint as it was filed in state court. Secondly, the action was not filed in federal district court, so here the issue arises out of the fact that Schacht chose to file in state court, not in federal court, a right and a choice that no one disputes Schacht had. As was succinctly stated by Judge Gordon in *Gibson v. City of Glendale Police Department*, 786 F.Supp. 1452, 1457 (E.D. Wis. 1992):

> The well-known purpose of 42 U.S.C. § 1983, with its origin in § 1 of the Civil Rights Act of 1871, was to provide a federal forum for civil rights plaintiffs. The purpose was implemented out of a concern that those who had been deprived of their constitutional rights by persons acting under color of the laws of a state would otherwise be forced to attempt to vindicate those rights in the courts of that very state. That purpose is not disserved where, as here, it is the intended beneficiary of § 1983 – the civil rights plaintiff – who elects to litigate in a state forum. (Citations omitted)

Petitioners claim that, "Removal jurisdiction would have been invoked if the district court only had federal question jurisdiction over one of several removed claims." Petitioners' brief at 12.[7] Petitioners erroneously

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[7] Not surprisingly, that sentence is not followed by a citation or reference to any authority. The text of §§ 1441(a) and 1441(b) states that an "action" not "claim" may be removed, and the notion of a district court accepting jurisdiction over an isolated claim is inconsistent with judicial interpretations of the removal statutes and is unprecedented. In arguing as they do in this sentence, petitioners contradict themselves. The point they are making in this sentence is at odds with the assertion that they make that they "had to join together to remove since only a single controversy was alleged." Petitioners' brief at 10-11, *citing Chicago, R.I.&P. Ry. Co. v. Martin*, 178 U.S. 245, 247-48 (1900).

attempt to build an argument in support of that proposition on the basis of this Court's recent decision in *City of Chicago v. International College of Surgeons*, 118 S.Ct. 534 (1997). *Id.* at 11-14. They cite to *City of Chicago*, 118 S.Ct. at 530, for the proposition that, "[S]tate law claims could not make removal improper since the 'federal claims suffice to make the actions "civil actions" within the "original jurisdiction" of the district courts for purposes of removal. § 1441(a).' " *Id.* at 12-13. Yet, *City of Chicago* is inapposite because it did not involve a state defendant or the Eleventh Amendment. It involved a mix of federal claims and state claims subject to pendent or supplemental jurisdiction – not a single core of facts and federal legal issues as exists in this case. Moreover, repeatedly – in 1875, 1948 and 1990 – Congress repudiated piecemeal removal of claims. Edward Hartnett, *A New Trick from an Old and Abused Dog: Section 1441(c) Lives and Now Permits the Remand of Federal Question Cases*, 63 Fordham L.Rev. 1099, 1148 (1995).

Nothing in *City of Chicago* changes what was said by this Court in *Edelman* and its progeny: "The Eleventh Amendment . . . partakes of the nature of a jurisdictional bar. . . . " *Edelman*, 415 U.S. at 678. In the context of the removal by a state of an action brought exclusively under 42 U.S.C. § 1983, that jurisdictional bar necessarily should

be considered a bar to the federal court's "original jurisdiction." Certainly, nothing in *City of Chicago* can be construed to the contrary.

Likewise, petitioners' citations to other cases of this Court are inappropriate. They refer, at 13 and 14, to *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 359 (1959), but that case did not involve an issue of federal jurisdiction over a state defendant. They cite, at 13, *Delmuth v. Muth*, 491 U.S. 223, 231-32 (1989) and *Employees v. Missouri Department of Public Health and Welfare*, 411 U.S. 279, 285 (1973), but those are cases in which the court found Eleventh Amendment immunity to exist, thus disposing of the claims in federal court against the state defendants. At 13-14, they cite *Idaho v. Coeur d'Alene Tribe of Idaho*, 117 S.Ct. 2028, 2033 (1997), but *Idaho* was brought in federal court, not removed to federal court, and nothing in the Court's opinion foreclosed the possibility that the claim could have been litigated in state court. At 14, they cite *Ames v. Kansas*, 111 U.S. 449, 470-72 (1884), but that was a case in which the action was brought *by* a state and removed by a private corporation. Finally, at 14, they cite *Illinois v. City of Milwaukee*, 406 U.S. 91, 100-101 (1972), and again that case involved an action filed by a state, this time against a municipal defendant.

These citations are as unpersuasive as petitioners' argument that removal should not be based upon "the character of a defendant being a State" and their argument that "removal rights" are "granted to all defendants." *See* petitioners' brief at 14. Naturally, the character of the defendant is relevant, because defendants are the parties who seek removal. Removal rights

are granted to all defendants – except that special and unusual class of defendants who have Eleventh Amendment immunity and seek removal without being willing to waive it.

The gist of petitioners' argument is contained in this sentence from their brief, at 14: "That a defendant removing an action is a State or a State official is simply irrelevant to determining whether the district court has federal question jurisdiction when the action is removed." The problem for petitioners is twofold. First, they offer no citation or other reference to authority following that sentence, and there is none available to them. Secondly, they mistake the issue, which is whether the federal court has original jurisdiction under § 1441(a), not federal question jurisdiction under § 1441(b).

The peculiarity of petitioner's choice to seek removal in a case which had obvious Eleventh Amendment problems is inescapable. It is the same irony that was underscored by Judge Flaum writing for the Seventh Circuit in *Frances J.*. *See* 19 F.3d at 340 ("We are curious why Defendants would engage in such a paradoxical jurisdictional maneuver, unless they merely had hoped to split the prospective relief claims from those that are retrospective in nature."). That concern, reflected in the holding of *Frances J.*, the holding of the Seventh Circuit in the instant action, and the holdings of the Seventh Circuit and the other circuits that are consistent with it,[8] is a legitimate concern, and the holdings are important for the purpose of nipping in the bud the urge of every trial lawyer –

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[8] *See* cases *infra* at 35-37.

whether for plaintiffs or defendants – to play fast and loose with the rules of civil procedure.[9]

Petitioners make a lengthy argument about the alleged attempt of the Seventh Circuit to control their Eleventh Amendment immunity defense (petitioners' brief at 20-26), which appears to be based upon a misconception of the Eleventh Amendment. They say, "Eleventh Amendment immunity is, by its unique nature, a shield States, not federal courts, control." *Id.* at 21. However, in fact, their only control is to waive the immunity or not to waive it – knowing full well that if it is not waived, it may be raised by the district court, the court of appeals, or this Court *sua sponte*. *Mt. Healthy*, 429 U.S. at 279. Petitioners say, "States . . . control its use, not plaintiffs or federal courts." Petitioners' brief at 23. However, the states really only control waiver of the immunity – not the effect of the Eleventh Amendment when the state chooses to remove without consenting to

[9] Petitioners warn that under what they call "the reverse logic articulated by the Seventh Circuit" there would be a problem of plaintiffs injecting "[p]atently frivolous or baseless claims" into complaints to bar states from removing actions to federal court. Petitioners' brief at 35. However, this worry over what we might call a "poison pill" is not well founded. First, a patently frivolous or baseless claim presumably would be dismissed early on by the state court on the state's own motion, whereupon removal would be a readily available option under 28 U.S.C. § 1446(b). Furthermore, the alleged problem of frivolousness should be dealt with effectively by either Fed. R. Civ. P. 11 or its functional equivalent in each respective state, which in Wisconsin is § 814.025, Wis. Stats.

waiver.[10] They argue, "Eleventh Amendment immunity is not for federal courts to assert on their own – particularly **against** the states. . . . " *Id.* at 24-25 (bold-face type in the original). However, the Seventh Circuit in this case did not use the Eleventh Amendment against *the State*. It ruled against the notion that states may remove actions with claims that are barred under the Eleventh Amendment while at the same time not consenting to waiver of their Eleventh Amendment immunity. App. 38-40. Finally, petitioners argue that they have the right to shoot at the "Achilles' heel" of "a plaintiff's claim when the State chooses to **invoke** Eleventh Amendment immunity." *Id.* at 25 (bold-face type in the original).[11] This considerably cavalier assertion demonstrates how privileged the State believes it should be. Yet, a state does not truly invoke the Eleventh Amendment. It is simply there, at all times, in the Constitution, unless the state chooses to waive it.[12]

[10] Petitioners display a bizarre notion of what the Eleventh Amendment does and how it applies. In their zeal to win, the State seems to turn Eleventh Amendment jurisprudence on its head. They say they control or "invoke" Eleventh Amendment immunity as if it were an issue of venue, res judicata, or other affirmative defense normally presented by motion under Fed. R. Civ. P. 12(b)(6) and waived if not explicitly asserted. However, our understanding of the Eleventh Amendment is very different. It is a broad bar from suit that prevents an action in federal court against a state or state official. *Edelman*, 415 U.S. at 678.

[11] At the end of this quotation and each of the previous three quotations from Section III of petitioners' brief, at 21-25, petitioners offer no citation or authority for their assertions. All four points are pure rhetoric, not statements of law.

[12] Throughout this section of their brief the petitioners seem to have a chip on their shoulder about the existence of the

B. There Was No Need For The State To Remove The Action From State Court.

Petitioners have submitted a long and comprehensive brief, but one omission that calls into question their entire argument is their failure to explain why the State and officials sued in their official capacities did not waive their sovereign immunity when they chose to remove the case to federal court. Why did they have to leave their home court to litigate in federal court?

Petitioners would not have been adversely affected had the case remained in state court. Naturally, one would assume that, if anything, the State would have the home-court advantage in its own court. Certainly, there is nothing in the record evidencing that petitioners would have been harmed if the case had remained in state court or now would be harmed if the state court terminates its

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Eleventh Amendment problem of their own making. It is highly ironic that the respondent finds himself in the role of advocating for the Eleventh Amendment in this Court. It would seem that the Attorney General of Wisconsin and the other attorneys general who have filed the Brief *Amicus Curiae* of 22 States in Support of Petitioner would want to stand on the side of the Eleventh Amendment – claiming its benefits under the Constitution and accepting the responsibilities inherent with it. The only way the Eleventh Amendment bar to removal to federal court can be breached is if the state defendant explicitly and unequivocally waives Eleventh Amendment immunity. *Port Authority Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305-06 (1990).

existing order staying proceedings pending the decision in this Court.[13]

Petitioners' argument that the decision of the Seventh Circuit is costly in terms of judicial economy is unpersuasive and cannot conceivably be reconciled with their own behavior. If their true concern were, as they assert, that they should not be subjected to suit because the State and its officials are not "persons" under § 1983, then clearly the action they could have taken which best served judicial economy would have been to move to dismiss in state court. Instead, they make an argument which defies common sense. The fact remains that, if this action would have been dismissed in any court, as they argue, there was no reason to get a second judicial system involved by removing the action to federal court and asking for the relief of dismissal there.

Effectively, there will be little, if any, difference in the time and expense for the parties whether the decision of the Seventh Circuit is affirmed or reversed. If reversed, the matter undoubtedly will have to be re-presented in supplemental briefs and oral argument to the Seventh Circuit on the merits of petitioners' motion for summary judgment. Likewise, if this Court affirms the Seventh Circuit, the same issues will be briefed and argued in the state court. Thus, the record before the Court does not

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[13] Of course, petitioners would prefer to have the litigation at an end. However, the issue of whether the district court's granting of summary judgment should be affirmed or reversed still would be pending in the event the decision of the Seventh Circuit were reversed. Therefore, continued litigation after this Court reaches its decision is certain, either way.

demonstrate harm to petitioners from being confined to state court.

Although they assert they are somehow being denied a "right" or privilege by the decision of the Seventh Circuit, they offer no authority for that claim. They are not, as they claim, relegated to the ranks of second class citizens under the federal removal statutes. If they were allowed removal without waiving their Eleventh Amendment immunity, they would have a clear strategic advantage over the ordinary defendant seeking to remove a federal question case from state court.

There may be important reasons for granting special privileges to state employees. *Cf., e.g., Richardson v. McKnight*, 117 S.Ct. 2100, 2105-2108 (1997) (Many policy considerations underlie the granting of qualified immunity to state employees that do not warrant immunity for private prison guards). Likewise, there are important reasons for extending sovereign immunity to states and state officials in federal court. *See, e.g., Ex parte Young*, 209 U.S. 123 (1908); *Edelman v. Jordan*; *Quern v. Jordan*.

While petitioners claim it is important to them to remove the case to federal court, they do not enunciate a viable reason why they have failed to waive their Eleventh Amendment immunity. There is no practical reason for their failure to waive immunity because Wisconsin, like most states, has an indemnification statute which

ensures that a judgment against a state employee in a case such as this will be paid by the State.[14]

One cannot fail to see the true purpose of petitioners in this case, which was and is to refashion the intended shield of the Eleventh Amendment into an effective sword to defend successfully against liability claims. Thus, petitioners' true gripe would appear to be not that they are relegated to second class citizens but, in fact, that they have been deprived of an unfair advantage they have enjoyed over non-state defendants seeking federal question removal from state court.

II. THERE IS NO FUTILITY EXCEPTION TO THE REMAND MANDATE OF 28 U.S.C. § 1447(c).

The critical statute in this case, 28 U.S.C. § 1447(c), states, "If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the

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[14] *See* § 895.46(1)(a), Wis. Stats., which provides in pertinent part:

> **State and political subdivisions thereof to pay judgments taken against officers.** (1)(a) If the defendant in any action or special proceeding is a public officer or employee and is proceeded against in an official capacity or is proceeded against as an individual because of acts committed while carrying out duties as an officer or employee and the jury or the court finds that the defendant was acting within the scope of employment, the judgment as to damages and costs entered against the officer or employee in excess of any insurance applicable to the officer or employee shall be paid by the state or political subdivision of which the defendant is an officer or employee. . . .

case shall be remanded." As the previous section of this brief has demonstrated, the Seventh Circuit was correct in determining that it appears the district court lacked subject matter jurisdiction in this case. Although petitioners may argue to the contrary, at 29-30, their contention that any court would dismiss the claims that were dismissed by the federal court in this case under the Eleventh Amendment does stand for the proposition that there is a futility exception to the remand mandate of § 1447(c). In fact, that issue is the crux of the matter in this case and the issue upon which the outcome turns.[15]

A. The Rule Of *International Primate Protection League*, That Remand Is Required When It Appears The Federal Court Lacks Subject Matter Jurisdiction, Should Be Dispositive In This Case.

The Court has made it clear that there is no "futility exception" to the remand mandate of 28 U.S.C. § 1447(c). *See International Primate Protection League v. Administrators*

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[15] The heading of the section of petitioners' brief at 29 states, "There was, and is, no need to determine if there is a futility exception to removal statutes." However, as a practical matter, petitioners are arguing that there is a futility exception – albeit an exception for the purpose of implementing petitioner's conclusion regarding the effect of the rule that a state is not a "person" under § 1983. Petitioners' argument is downright disingenuous, when it is asserted (twice) that the Court should leave the question open "for resolution in a future case which more clearly sharpens the competing interests and principals." Petitioners' brief at 29, 30. It is difficult to imagine a case which could be said to more clearly sharpen the issue of whether there is a futility exception to § 1447(c) than this case.

of Tulane Educational Fund, 500 U.S. 72, 89 (1991) (noting "the literal words of § 1447(c), which on their face, give no discretion to dismiss rather than remand an action"). Whether that was the holding of the Court, which may be in doubt,[16] the Court's reasoning was unmistakable and controlled the disposition of the case.

In *International Primate*, an animal rights group had brought suit in state court seeking to bar Tulane University and the National Institutes of Health (NIH) from euthanizing monkeys and from conducting subsequent autopsy research, and the NIH removed the action to federal court. *Id.* at 74-75. The Court held that the statute authorizing removal of state suits by federal officers does not permit removal by federal agencies and that the animal rights groups had standing to challenge removal. *Id.* at 77 and 79. Having concluded that NIH lacked authority to remove the suit to federal court, the Court proceeded to determine whether the case should be remanded to state court. *Id.* at 87. The Court said, "Section 1447(c) of Title 28 provides that, '[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction [over a case removed

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[16] The Court of Appeals for the Third Circuit recently followed the Court's decision in *International Primate*, although it said that the Court's unwillingness to recognize a "futility exception" had been expressed "in dicta." *Bromwell v. Michigan Mutual Insurance Company*, 115 F.3d 208, 213 (3rd Cir. 1997). However, inasmuch as the Court's handling of the issue under the facts in *International Primate* was explicit and dispositive of the case, it reasonably may be viewed as a determinative ruling on the merits of the issue, as it has been treated by the vast majority of the circuit courts of appeals. *See infra* at 35-38.

from state court], the case shall be remanded.' " *Id.* Then the Court reasoned that, "Since the district court had no original jurisdiction over this case, . . . a finding that removal was improper deprives that court of subject matter jurisdiction and obliges a remand under the terms of § 1447(c)." *Id.*

The Court noted that, "NIH asks us to affirm the Court of Appeals' dismissal of this suit on the grounds that a remand of petitioners' claims to Louisiana court would be futile." *Id.* After acknowledging the futility asserted by NIH, the Court said, "[W]e decline to speculate on the proper result." *Id.* at 89. In doing so, the Court expressly noted " 'the literal words of § 1447(c), which, on their face, give . . . no discretion to dismiss rather than remand an action.' " *Id., quoting Maine Association of Interdependent Neighborhoods v. Commissioner, Maine Department of Human Services,* 876 F.2d 1051, 1054 (1st Cir. 1989) (then-Judge Breyer writing for the court). Finally, the Court gave emphasis to the words "shall be remanded" in the wording of 28 U.S.C. § 1447(c). *See id.* ("The statute declares that, where subject matter jurisdiction is lacking, the removed case '*shall* be remanded.' " (emphasis added by the Court in the original)).

Thus, the Court made it abundantly clear that its strict interpretation of 28 U.S.C. § 14[illegible] leaves no room for a "futility exception." That result is consistent with very long standing decisions of this Court. The backdrop of these decisions, of course, is the Article III limitation on the jurisdiction of the federal courts. *Pennhurst,* 465 U.S. at 120. While a court has jurisdiction to decide if it has subject matter jurisdiction, once it decides ~~it has none~~ Article III bars the court from taking further action. *Steel*

Company, 118 S.Ct. at 1012. As the Fifth Circuit said, "The subject matter jurisdiction of federal courts is limited by the Constitution and the Congress, and cannot be expanded by judicial interpretation or by the acts or consent of the parties to a case." *In re Carter,* 618 F.2d 1093, 1100 (5th Cir. 1980) (*citing American Fire & Casualty Co. v. Finn,* 341 U.S. 6, 17-18 (1951)), *cert. denied,* 450 U.S. 949 (1981). In effect, petitioners are suggesting that the Court should render an advisory opinion after it has already decided that there is a lack of subject matter jurisdiction. However, once the Court determines that there is a lack of jurisdiction, that is the end of the matter. *Steel Company,* 118 S.Ct. at 1012.

The Court has said, "The jurisdiction of federal courts is carefully guarded against expansion by judicial interpretation or by prior action or consent of the parties," noting a long line of cases dating back to and before the Dred Scott Case. *American Fire & Casualty Co.,* 341 U.S. at 17-18 text and n.17. In *American Fire,* the case had been removed without right from state to federal court at the request of the defendant. *Id.* at 17. The federal court lacked original jurisdiction at its inception, and up to and including the time of judgment the district court continued to be without jurisdiction. *Id.* The Court held that the defendant who removed the action was not estopped after judgment from protesting that there was no right to removal. *Id.* at 18. The Court ordered the cause remanded to the district court with directions to vacate the judgment and to remand the case to state court. *Id.* at 18-19. *American Fire* and *International Primate* are both analogous to the case at bar.

The Seventh Circuit correctly followed *International Primate* and its own sentinel case on the subject, *Frances J. v. Wright*. *See Schacht v. Wisconsin Department of Corrections*, 116 F.3d 1151 (7th Cir. 1997) (App. 35-40).[17] The court acknowledged petitioners' argument that "remand would be futile and would result in a waste of judicial resources." 116 F.3d at 1153 (App. 39). It countenanced the same arguments made by petitioners to this Court:

> Specifically, the defendants contend that if we remand, the state court will simply dismiss the official capacity claims and the claims against the WDOC for failing to state a claim on which relief may be granted, or on grounds of sovereign immunity, and duplicate the analysis the district court devoted to the remaining claims. See *Lindas v. Cady*, 441 N.W.2d 705, 709 (Wis. 1989) (noting that "states are not 'persons' within the meaning of sec. 1983"). See also *Arizonans for Official English v. Arizona*, 117 S.Ct. 1055, 1069 (1997) (noting that "sec. 1983 actions do not lie against a State").

Id. Then, relying upon the most recent applicable decisions from this Court, the court said:

> Even if the defendants have accurately forecast the fate of this case on remand, we are not

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[17] Although petitioners criticize the Seventh Circuit for reaching out to raise the issue of subject matter jurisdiction, under the facts of this case it was obliged to do so. *See Arizonans*, 117 S.Ct. at 1072 ("When the lower federal court lacks jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purposes of correcting the error of the lower court in entertaining the suit." (*quoting Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986), *quoting in turn United States v. Corrick*, 298 U.S. 435, 440 (1936).)).

> free to disregard a jurisdictional defect. See *Arizonans*, ___ U.S. at ___, 117 S.Ct. at 1071. Contrary to their suggestion, there is no "futility exception" to § 1447(c). The Supreme Court noted that the literal words of § 1447(c) leave no room for such an exception. See *Primate Protection League v. Tulane Educational Fund*, 500 U.S. 72, 89, 111 S.Ct. 1700, 1710, 114 L.Ed. 2d 134 (1991). See also 28 U.S.C. § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case *shall* be remanded.") (Emphasis added).

Id. The disposition of the instant action by the court below – rejecting the same arguments made by petitioners – was consistent with all applicable guideposts from this Court and was correct.

Since the decision in *International Primate*, petitioners' proposed "futility exception" has been expressly rejected by the circuit courts of appeals for the Third, Fourth, and Seventh Circuits. *See Bromwell v. Michigan Mutual Insurance Company*, 115 F.3d 208, 214 (3rd Cir. 1997) ("[W]e hold that when a federal court has no jurisdiction of a case removed from a state court, it must remand and not dismiss on the ground of futility."); *Roach v. West Virginia Regional Jail and Correctional Facility Authority*, 74 F.3d 46, 49 (4th Cir. 1996) (noting that "the futility of a remand to the West Virginia state court does not provide an exception to the plain meaning of § 1447(c)"); *Schacht*, 116 F.3d at 1153 (App. 39) (holding that "there is no 'futility' exception to § 1447(c)"); *Gorka By Gorka v. Sullivan*, 82 F.3d 772, 774-775 (7th Cir. 1996) (following the holding in *Frances J.* that the entire case should be remanded, if the federal court does not have original jurisdiction because

of a claim barred by sovereign immunity); *International College of Surgeons v. City of Chicago, Illinois*, 91 F.3d 981, 993-994 (7th Cir. 1996) ("removal is proper only if the action originally could have been brought in the district court"), *rev'd on other grounds*, 118 S.Ct. 523 (1997); *Frances J.*, 19 F.3d at 341 ("[I]f even one claim in an action is jurisdictionally barred from the federal court by a state's sovereign immunity, . . . then as a consequence of § 1447(a), the whole action cannot be removed to federal court."), *cert. denied*, 513 U.S. 876 (1994); *Smith v. Wisconsin Department of Agriculture, Trade and Consumer Protection*, 23 F.3d 1134, 1139 (7th Cir. 1994) ("[T]he Supreme Court has squarely rejected the argument that there is an implicit 'futility exception' hidden behind the plain meaning of § 1447(c)"). The Second Circuit also has recognized that such an exception probably does not exist in light of the decision in *International Primate*. *Barbara v. New York Stock Exchange*, 99 F.3d 49, 56 n.4 (2nd Cir. 1996).

Two cases dealing with this issue were decided prior to *International Primate* in a manner consistent with *International Primate* – one from the Fifth Circuit and one from the First Circuit. In *McKay v. Boyd Construction Co., Inc.*, 769 F.2d 1084 (5th Cir. 1985), the court held that the Eleventh Amendment precluded the federal district court from exercising removal jurisdiction over a state agency and, therefore, that remand of the claim against the state agency also required remand of the claim against the private contractor since they were allegedly jointly liable. In the second case, explicitly noted in *International Primate*, the First Circuit expressly refused to adopt the futility exception, stating that "the fact that we believe a certain legal result *unlikely*, as a matter of state law, is not

sufficient grounds for reading an exception into the absolute statutory words 'shall be remanded'." *Maine Association of Interdependent Neighborhoods*, 876 F.2d at 1055 (emphasis in the original).

Only the Ninth Circuit has recognized a "futility exception" since this Court's decision in *International Primate*. In *Kruse v. State of Hawai'i*, 68 F.3d 331, 334 (9th Cir. 1995), the court held that removed § 1983 claims to which the Eleventh Amendment immunity might apply should be dismissed, rather than remanded to state court, because the state is not a "person" under § 1983.

Kruse, in rejecting the logic of the Seventh Circuit in *Frances J.*, adopted what it called "the better-reasoned approach of the Sixth Circuit" in *Henry v. Metropolitan Sewer District*, 922 F.2d 332 (6th Cir. 1990). *See* 68 F.3d at 334-335. However, the decision in *Henry* also predated this Court's decision in *International Primate*. Remarkably, the *Kruse* decision does not even mention *International Primate*, which was decided more than four years before *Kruse*. *Kruse* was wrongly decided.

All of the courts to look at the issue post *International Primate*, except the Ninth Circuit, agree with the position of the respondent in this case. Because *Kruse* did not attempt to construe the applicable language of the removal statutes, did not mention *International Primate*, and based its decision on a decision from the Sixth Circuit which pre-dated *International Primate*, it should be viewed as an anomaly, particularly in light of the literal language of the removal statutes, the clear effect of the Eleventh Amendment, and the controlling principle that

courts lack the power to render advisory opinions without subject matter jurisdiction. In short, there is no legal basis for carving out a "futility exception" to § 1447(c), and doing so would raise serious Article III concerns.

B. It Would Be Both Improper And Unwise For Federal Courts To Speculate About The Alleged Futility Of A Remand As Petitioners Suggest In This Case.

The flaw in petitioners' argument and the approach taken by the Ninth Circuit in *Kruse* is related to the reason the Court declined "to speculate on the proper result" in *International Primate*. *Cf. International Primate*, 500 U.S. at 89. That is, the Court lacked subject matter jurisdiction, which was necessary as a predicate for undertaking the inquiry into the alleged futility. As the Seventh Circuit has said, "[T]he point of § 1447(c) is that a federal court does not have the authority to dismiss a claim over which it never had jurisdiction in the first instance. The merits of the state law claim are therefore irrelevant to this determination." *Smith*, 23 F.3d at 1339 n.10. That conclusion reflects the fact that " '[a] court lacks discretion to consider the merits of a case over which it is without jurisdiction. . . . ' " *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988) (*quoting Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981)). *See also Steel Company*, 118 S.Ct. at 1012.

This Court and the federal courts generally make reference to "the literal words of § 1447(c)" and specifically to the phrase "shall be remanded." *See, e.g., International Primate*, 500 U.S. at 89. In addressing the specific

argument of petitioners and the aberrant approach of the Ninth Circuit in *Kruse*, however, respondent focuses upon other words in the sentence, "If at any time before final judgment *it appears that* the district court lacks subject matter jurisdiction, *the case* shall be remanded." (emphasis added). The literal words of § 1447(c) on their face support the interpretation that there is no futility exception. First, § 1447(c) states that the case shall be remanded if *it appears that* the district court lacks subject matter jurisdiction, implying that the case shall be remanded if the problem of subject matter jurisdiction appears to exist – not that there shall be a detailed inquiry into the matter by the federal court before remand occurs. Secondly, § 1447(c) provides that, when it appears that the district court lacks subject matter jurisdiction, *the case* shall be remanded, implying that the entire action shall be remanded – not specific claims or other subparts of "the case." Indeed, one need not look further than the literal words of 28 U.S.C. § 1447(c) to see that the decision of the Seventh Circuit in this case should be affirmed.

Even if there were a "futility exception" to § 1447(c), a remand would not be futile in this case. Even if speculation were proper, petitioners' speculation that remand would be a nullity is not correct. Certainly, upon remand the state court could determine that Schacht has viable claims for the denial of liberty and property without procedural due process and substantive due process of law, which claims should go to trial to a jury, as urged by respondent in the pending appeal before the Seventh Circuit.

Upon remand, respondent has a right to file an amended or supplemental pleading, as provided in § 802.09, Wis. Stats. Respondent could amend his pleadings to state a claim for damages, reinstatement and backpay for denial of liberty and property in violation of his right to due process of law under the Wisconsin Constitution. Wis. Const. Art. I, § 1. Although it may be anticipated petitioners would object on the grounds that respondent has not complied with the notice of claim statute, § 893.82, Wis. Stats., the fact that he did not file a notice of claim is not a bar to an action for a tort committed by a state agency and state officials in violation of the state constitution. *See, e.g., Zinn v. State*, 112 Wis. 2d 417, 334 N.W.2d 67 (1983) (Doctrine of sovereign immunity cannot bar an action for just compensation based on the taking of private property for public use even though the legislature failed to establish specific provisions for recovery of just compensation.). Whether the respondent would prevail in such an effort may be unknown, but the point remains that remand in this case is not futile.

Speculation by the federal courts as to what may happen in the state courts is also unwise because decisions of the federal courts interpreting or applying state law are not *stare decisis* and need not be followed by state courts. *Freeman v. Lane*, 962 F.2d 1252 (7th Cir. 1992); *see also, United States ex rel. Lawrence v. Woods*, 432 F.2d 1072, 1076 (7th Cir. 1970) ("[B]ecause lower federal courts exercise no appellate jurisdiction over state tribunals, decisions of lower federal courts are not conclusive on state courts.") Therefore, it would not be prudent for this Court to encourage federal district courts to get into the

business of unnecessarily interpreting state law or predicting what effect their remand orders may have after implementing the mandate of § 1447(c). The only thing that is certain upon remand in this case is that the state court has jurisdiction to proceed on respondent's claims against the petitioners named in their individual capacities as defendants. *Hafer; cf. Will.*

III. PETITIONERS' INTERPRETATION OF THE REMAND STATUTES IS CONTRARY TO FUNDAMENTALS OF STATUTORY CONSTRUCTION, THE INTENT OF CONGRESS, AND SOUND PUBLIC POLICY.

The argument by petitioners, which is essentially that the Court should engage in modification or interpretation of the literal words of § 1447(c), is contrary to basic principles of statutory construction. Recently, the Court said:

> Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and "the statutory scheme is coherent and consistent."

Robinson v. Shell Oil Company, 117 S.Ct. 843, 846 (1997), *quoting United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 240 (1989). That "there is no need to refer to the legislative history where the statutory language is clear"

is a "canon of construction [which] has received consistent adherence in [this Court's] decisions." *Ex parte Collett*, 337 U.S. 55, 61 (1949). In *Connecticut National Bank v. Germain*, 503 U.S. 249 (1992) the Court said:

> We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. . . . When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."

503 U.S. at 253-254, *quoting Rubin v. United States*, 449 U.S. 424, 430 (1981) *and citing Ron Pair Enterprises*, 489 U.S. at 241-242, *United States v. Goldenberg*, 168 U.S. 95, 102-03 (1897), *and Oneale v. Thornton*, 6 Cranch 53, 68, 3 L.Ed. 150 (1810).

Nonetheless, the legislative history of the removal statutes demonstrates that it was the intent of Congress that the Court should adhere to the literal words of § 1447(c) and remand the entire action, not just individual claims, to state court when federal subject matter jurisdiction is lacking. That conclusion follows from the fact that the legislative history strongly supports the conclusion of the Seventh Circuit that only cases that are wholly within federal jurisdiction are removable under 28 U.S.C. § 1441(a).

The Judiciary Act of 1789 precluded removal of parts of cases. Hartnett, 63 Fordham L. Rev., *supra*, at 1113-15. A short-lived Congressional experiment with permitting removal of parts of cases between 1866 and 1875 was ended because "much confusion and embarrassment, as well as increase in the cost of litigation" resulted. *Id.* at 1115-21. When federal courts nevertheless occasionally

permitted removal of parts of cases, *id.* at 1121-29, the resulting confusion led Congress to again repudiate the notion of piecemeal removal in the Revised Judicial Code of 1948. *Id.* at 1132. Finally, the 1990 amendment to 28 U.S.C. § 1441(c) was based on the Congressional assumption that § 1441(a) only authorizes removal if the entire case is within federal jurisdiction and that piecemeal removal is not permitted. *Id.* at 1148. "Thus, just as it had done in 1875 and 1848, Congress in 1990 again repudiated piecemeal removal." *Id.*

The Court can avoid repeating the errors of the past by affirming the Seventh Circuit to ensure that we do not go back down old roads again. It would be a shame to have to yet again endure the confusion and increased litigation costs of the piecemeal removal implicitly advocated by petitioners' arguments to the Court. To do so would only force Congress – once again – to call a halt. The burden should be upon petitioners to convince Congress, not this Court, that §§ 1441(a) and 1447(c) should be altered to suit their position. The history of those statutes is consistent with their unambiguous language, and the Court now has the opportunity to make it unmistakably clear that there is no "futility exception" to the remand mandate of § 1447(c).

Petitioners' unpersuasive policy arguments, in their brief at 31-36, can be summarized by their conclusion: "This is no way to run a judicial system." Petitioners' brief at 34. Policy considerations cannot outweigh the plain meaning of an unambiguous statute. *Robinson*, 117 S.Ct. at 846; *Connecticut National Bank*, 503 U.S. at 254.

Likewise, policy considerations should not be determinative in Eleventh Amendment jurisprudence where a court lacks subject matter jurisdiction.

Moreover, policy considerations actually favor the position espoused by respondent in this case. As the Seventh Circuit noted in *Frances J.*, "preventing a defendant from splitting a single case into two, one state and the other federal, furthers judicial economy." 19 F.3d at 341. *See also supra* at 19 n.5; Section I.B. *supra* at 27.

Federal courts are burdened enough now with § 1983 actions, and it would be good policy to have the state courts shoulder their fair share of the burden. They are competent courts of original jurisdiction. *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990); *Claflin v. Houseman*, 93 U.S. 130, 136 (1876). Certainly, the state courts of Wisconsin are prepared to accept their responsibility to do so. *See, e.g., Vogt v. Nelson*, 69 Wis. 2d 125, 230 N.W.2d 123 (1975) ("State courts are bound to entertain actions to enforce liabilities created by federal law unless prohibited by an act of Congress.").

Thus, sound public policy, legislative history evincing the intent of Congress, and canons of statutory construction line up in the parade of reasons why in this case the district court lacked subject matter jurisdiction and the action should be remanded to state court. The great weight of the arguments falls on the side of the respondent in this case and the conclusion that the Seventh Circuit decision was correct.

CONCLUSION

For the foregoing reasons the decision of the United States Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

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